COMMISSION OF THE CITY OF KUCHING NORTH A

v.

CHONGLIN PLAZA SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU JC
[SUIT NO: 22-67-2007-I]
12 MARCH 2010

LOCAL GOVERNMENT: *Rates - Arrears of assessment - Whether rates excessive - Whether court has jurisdiction to hear complaint of defendant on annual rateable value - Late payment fee - Whether not a penalty and imposed only once* C

The defendant was the owner of a properly known as Chonglin Plaza which was situated within the rating area of the plaintiff, a local authority. The plaintiff was claiming for arrears of rates from the defendant. The defendant had refused to pay the arrears on the ground that the rates were excessive. The issues that arose were (i) whether the court had jurisdiction to hear the complaint of the defendant on the annual rateable value (ARV) and (ii) whether the plaintiff was entitled to impose a late payment fee of 1% on the unpaid assessment rates between 1998 and 2005. D E

Held: F

(1) The defendant had not submitted that the assessment was *ultra vires* the Local Authorities Ordinance 1996 (LAO). The assessment was raised following the proper procedure under the LOA. The first objection was heard by the Objection Hearing Committee (OHC) but the defendant, though dissatisfied, did not appeal to the Rating Tribunal Board. When the separate notices were issued to the subdivided shop lots in 2001, the defendant did not pay the prescribed fee of RM20 and therefore the plaintiff did not refer the objection to the OHC. Even if the defendant was justifiably aggrieved about the decision of the plaintiff not to refer the objection to the OHC, he could have sought a mandamus to compel the plaintiff to do so as it was a public authority. However, the refusal of the plaintiff to refer the objection of the defendant to the OHC could not affect the validity of the rates determined by the plaintiff so long as they G H I

followed the procedure in the LOA. Therefore, the defendant had no ground to argue that the assessment was invalid. The court had no jurisdiction to consider the defence of the defendant that the assessment was exorbitant and unfair. Hence, there was no need to determine what should have been the fair ARV or annual rate. The plaintiff had proved that the assessment bills in respect of all the sublots of level 1 was properly issued in accordance with the LOA. In the premises, the defendant was legally liable to pay the same. (paras 15 & 16)

(2) The unpaid assessment bills on the 11 lots totalled RM430,029.68. The plaintiff was also claiming a sum of RM223,935.69 as late payment fee. However, instead of adding only a one-time 1% default fee on a given assessment bill which was based on a six month period, the plaintiff had charged 1% on the total remaining unpaid arrears of rate continuously from 1998 to 2005. On the 1998 first half assessment bill which remained unpaid at December of that year, a 2% late fee would have been added. By this method, by the last half of 2005, 16% late payment fee would have been added. In the case of *Generation Products v. Majlis Perbandaran Klang Sdn Bhd*, the Federal Court ruled that the late payment fee was not a penalty and it could be imposed only once. The Federal Court ruling was binding on this court. Hence, this court granted the judgment in the sum of RM430.029.68 as arrears of rates and RM4,300.30 as late payment fees. (paras 18, 20 & 21)

[Order accordingly.]

Case(s) referred to:

Generation Products Sdn Bhd v. Majlis Perbandaran Klang [2008] 5 CLJ 417 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC ***(refd)***

Tenaga Nasional Bhd v. Majlis Daerah Dungun [2009] 4 CLJ 385 FC ***(refd)***

Yee Seng Rubber Co Sdn Bhd v. The Commissioner Of The Federal Capital Of Kuala Lumpur [1972] 1 LNS 177 HC ***(foll)***

Legislation referred to:

Federal Constitution, art. 156

Local Authorities Ordinance 1996, ss. 2(1), 61, 62, 63(3), 67(2), 69(3A), (5), (6), 70, 74(1), 83, 88

Local Government Act 1976, s. 147(1)

For the plaintiff - Chan Kay Poh (Daniel Lee & Yeo Hui Hui with him); M/s Chan & Chan Advocates
For the defendant - Jamie Tai; M/s Tan & Partners Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JC:

Introduction

[1] The plaintiff is a local authority. The defendant is the owner of a property known as Chonglin Plaza which is situated within the rating area of the plaintiff. The plaintiff is claiming for arrears of rates from the defendant. The defendant had refused to pay the arrears on various grounds. The principal ground is that the rates were excessive.

Rating And Appeal Procedure

[2] Before I proceed to discuss the evidence and issues in this case, I shall briefly outline the assessment procedure and the avenues open to a proprietor to object to the payable rate that had been determined by the Rating Division of the local authority concerned. Under s. 61 of the Local Authorities Ordinance, 1996 (Cap 20) (LAO), a local authority is empowered to assess rates for all holding within its area if it is authorised by the State Cabinet or the Minister. To avoid repetition, all statutory references in this judgment are to the LAO unless otherwise indicated. Section 62 provides all holdings, ie, land with or without building are subject to payment of rates unless exempted for being used as place of worship, burial, education, etc. Section 63 requires the local authority to prepare a Valuation List of all holdings not exempted. The list should contain particulars of address, name of owner and the annual rateable value (ARV) of the building. Under sub-s. (3) the valuation list shall remain in force subject to new amendments until a new list is issued. If there is any addition or amendment in respect of the valuation list, the local authority shall give notice to all interested persons under s. 69. This notice is referred to by the plaintiffs' witnesses as the s. 69 notice. Sub-section (5) states that any amendment to the valuation list shall be confirmed by the local authority. However, if any person is aggrieved he may make an

objection on the grounds specified in s. 67 which includes the ground that a holding is valued beyond its rateable value. The objection will be heard by a committee set up by the local authority itself. The plaintiffs' witnesses referred to this committee as the Objection Hearing Committee (OHC). Section 70 states that if any person is dissatisfied with the decision of the local authority on the objection, he may appeal to the Rating Appeal Tribunal within 30 days. This body is set up under s. 88. It consists of a Chairman who is not from the local authority and four other members. Any person aggrieved by the decision of the Rating Appeal Tribunal may appeal within three months to the High Court.

The Claim

[3] The facts of this case are largely undisputed and the case turns on several questions law. The plaintiff was incorporated under the City of Kuching North Ordinance 1988 (Cap 49). Chonglin Plaza which is located along Green Road in Kuching is a 20-storey building. There is no dispute that the plaintiff is authorised to levy rates on this building. The plaintiff is claiming arrears of rates from 1998 to 2005 in respect of the 11 units of shop lots at Level 1. The total sum allegedly due as arrears of rates is RM430,029.68. In addition, the plaintiff is also claiming 1% late assessment fees which was calculated from the time of default up to 22 March 2007 when the instant action was instituted. The total late payment fee which was calculated in the manner of accrued penalty interest amounted to RM223,935.69.

Plaintiffs' Witnesses

[4] The plaintiff called a total of seven witnesses. The first witness, Siti Fatimah Jamail (PW1) was its Head of Legal Affairs. She testified, unchallenged, that the defendant failed to pay the rates for the separate parcels in Level 1 from 7 September 1998 to the second half of 2005. The only exception was for sublot 1.05 for which the defendant did not pay rates from the 1st half of year 2001 to 2nd half of year 2005. The plaintiff agreed that the defendant paid the rates from 2006 onwards. The other six witnesses the plaintiff called are valuers and officers from the plaintiff's rating division. These witness testified, virtually unchallenged, that assessment had been raised against the 11 units of Level 1. The relevant facts that were elicited from these witnesses are as follows. The occupation permit for Chonglin Plaza was issued on 7 September 1998. The rating division then proceeded to assess the

rate that is payable in respect of the 20 floors of Chonglin Plaza. The annual payable rate is based on the ARV that is calculated in accordance with s. 2(1). Section 2(1) defines ARV as:

> ... the estimated gross annual rent at which the holding might reasonably be expected to let from year to year the landlord paying the expenses of repair, insurance, maintenance or upkeep and all rates and taxes: ...

[5] To calculate the ARV, comparison was made with other rented holdings with similar structure and purpose or use. Apparently, the major complaint of the defendant is this. The Chonglin Plaza is a 20-storey building but only one floor, ie, Level 1 has eleven shop lots. All the other floors are used for residential purposes. However, the defendant complained that the rates imposed on Level 1 is comparable to the rates imposed on the ground of floor of shopping complexes such as Wisma Saberkas. I shall discuss the validity of this complaint from the standpoint of the LAO at a later stage. Coming back to the evidence of the plaintiffs' witnesses, the whole of Chonglin Plaza was originally assessed as a single building and the ARV was assessed at RM907,000. Based on this ARV, the annual rate was calculated at RM199,540. The assessment bill was thereafter issued on 18 September 2000. The defendant wrote in to object and paid a RM20 fee. The plaintiff reduced the ARV from RM907,000 to RM881,350 for the whole building. In respect of Level 1, the ARV was reduced from RM285,450 to RM260,100 on 17 October 2000. The defendant did not appeal against the decision to the Rating Appeal Tribunal. However, the defendant did not pay the rates for Level 1. In 2001, another development took place. The plaintiff started to issue separate assessment bills for all the subdivided lots in the building. These included the 11 sublots on Level 1. The s. 69 notices in respect of the ARV applicable effective from 7 September 1998 was also issued to all the 11 sublots. The total ARV in respect of the 11 sublots totalled RM260,100 which is the same as the ARV fixed on 17 October 2000 after the OHC heard the first objection. PW7 told the court that the separate assessment bills for Level 1 were sent out on 21 August 2001. The defendant wrote to the plaintiff to object to these assessment bills on the ground that the rates were exorbitant. However, the objection letter was not accompanied by the mandatory RM20 fee. Therefore the defendant did not convene the OHC to hear the objection. As a result the s. 69 notices were confirmed and the assessed rate was added to the valuation list. The

defendant was dissatisfied with the assessment. They did not pay the annual payable rate for Level 1 from 1998 to 2005. They only started paying rates from 2006 onwards when the rate was substantially reduced. In fact the defendant argued and appealed that the reduced rate in 2006 should be applied retrospectively. The plaintiff's case is that the earlier assessment notices were confirmed without appeal and therefore remain payable. The instant suit is for recovery of the arrears of rates payable for Level 1 between 1998 and 2005 by way of a civil debt under s. 83.

Defendants' Witnesses

[6] The defendant called only two witnesses, ie, the former general manager (DW2) of the defendant and a valuer (DW1). Predictably, the main complaint was that the assessment of the payable rate for Level 1 was too high in that it was equivalent to that of shopping centres. The argument of the defendant is that Chonglin Plaza is primarily a residential complex as only Level 1 has shop lots. DW2 also said that he did not receive the Section 69 notices issued on 21 August 2001. He apparently filed an objection later but did not pay the RM20 fee that was stipulated in s. 69. He told the court he was not aware of the procedure. He said that the plaintiff's officers should have informed him of it. The plaintiff also did not reply to eight other letters that he wrote on the same subject matter. The evidence of DW2 that he did not receive the s. 69 notices is not plausible for the following reason. DW2 stated in his letter dated 5 September 2001 to the defendant that he had received the assessment bills in question together with the respective covering notices.

[7] DW1 is an experienced valuer. His testimony focused on what should be the proper ARV and payable rate for sublots of Level 1 of Chonglin Plaza. He said that Level 1 of Chonglin Plaza should have been equated with a standard shop house in Kuching instead of being compared with the ground floor of a shopping centre like Wisma Saberkas. He gave lengthy evidence in respect of how he assessed what should be the proper ARV for Level 1. In his opinion, the ARV of RM156 per square meter as assessed by the plaintiff was excessive. He said that a fair ARV was RM30 per square meter.

Issues

[8] At the outset of the trial, the parties tendered a brief statement of agreed facts. However, they did not tender any issues to be decided. At the conclusion, of the trial, having regard to the LAO, the pleadings and the evidence, I suggested to counsel that the following questions should be answered in the final submissions. They are:

(1) Whether the court has jurisdiction to hear the complaint of the defendant on the ARV?

(2) If yes, what should be the fair ARV of Level 1 of Chonglin Plaza?

(3) Whether the plaintiff is entitled to impose a late payment fee of 1% on the unpaid assessment rates between 1998 and 2005?

[9] The parties basically confined their submissions to the above issues only. Therefore, *ex abundanti cautela*, I asked the parties, before delivering a decision, if they wished to address any other issue. They assured me that the case turns upon these issues only and that they had nothing to add to their written submission. My judgment on the above issues is as follows.

Whether The Court Has Jurisdiction To Hear The Complaint Of The Defendant On The ARV?

[10] In this case, the defendant has not denied refusing to pay the sum of RM430,029.68 which is the arrears of rates on which assessment bills have been issued. The defendant has virtually admitted knowledge of these bills as he had sent numerous letters to the plaintiff pleading for a lower assessment. The plaintiff had reduced the assessment for Level 1 from 2006 onwards but had refused to do so for the preceding years on which assessment bills had been issued. The LAO provides several modes of collection of unpaid rates including by way of attachment of the property in question. However, the plaintiff has chosen to recover the unpaid arrears under s. 83 of the LAO which reads as follows.

> 83. Notwithstanding anything therein, an arrear may be sued for and recovered as a debt in a court of competent jurisdiction by the local authority in its official name from any person liable to pay the same.

[11] This section provides for recovery of arrears of rate in the manner of a civil debt. As outlined earlier, the plaintiffs' witnesses gave evidence that the assessment bills in question were issued against the 11 sublots of Level 1 of Chonglin Plaza. They referred to the various assessment bills and other documents in the bundle of documents to prove that the rates were imposed on Level 1 and remains unpaid. The defendant did not challenge the fact the assessment bills were issued. Section 84 provides that:

> 84. The production of the books or records purporting to contain any rate or assessment made under this Part shall, without any other evidence, be *prima facie* proof of the making and validity of the rates or assessment mentioned therein.

[12] Since the plaintiff's witnesses tendered documents in respect of said assessment which remains unpaid, it constitutes *prima facie* proof of the "making and validity of the rates". Counsel for defendant submitted that s. 84 is not final and conclusive and therefore it is open for the defendant to challenge the validity of the rates imposed. In my opinion, the scheme of the LAO does not allow the assessment of the rates to be challenged by the defendant in a civil suit. This is because the LAO has provided a special procedure for a rate payer to challenge the assessment imposed by the plaintiff. Under ss. 67 and 69, a rate payer who wishes to challenge the assessment can object to the plaintiff in writing. The OHC set up by the plaintiff will hear the objection. If the rate payer is dissatisfied with the decision of the OHC, he can appeal to the Rating Appeal Tribunal under s. 70. In this case, after the first objection was lodged, the OHC heard and reduced the ARV. There was no further appeal to the Rating Appeal Tribunal. In the premises, the assessment was confirmed and the valuation list was amended (see s. 69(5)). Under s. 69, the rate so amended becomes payable (see s. 69(6)). In respect of the second objection when separate assessment notices were issued in respect of the 11 sublots, the defendant did not pay the statutory fee of RM20. Section 69(3A) provides that:

> (3A) Every objection made under sub-section (3) shall be accompanied by a fee of twenty ringgit in respect of each holding on the Valuation List.

[13] The defendant did not dispute not paying the objection fee of RM20. DW2 said that paying RM20 was "not a big deal". He said that he wrote eight letters to the plaintiff but they did not mention the RM20 fee. Counsel for defendant said it was "lame excuse" on

the part of the plaintiff for not hearing the objection. With respect, I find the argument of the defendant is devoid of merit. The defendant had earlier paid RM20 when he lodged the first objection but did not pay the same fee when he lodged the second objection. To my mind, s. 67(2) and s. 69(3) is couched in preemptory and mandatory language in respect of the condition of payment of RM20 when lodging an objection to a proposed assessment notice. Counsel for plaintiff is right to refer the court to the case of *Yee Seng Rubber Co Sdn Bhd v. The Commissioner Of The Federal Capital Of Kuala Lumpur* [1972] 1 LNS 177. Although that case concerned an appeal from the decision of a town board to the court, the principle that emerges from that case is that a condition precedent to the hearing of an appeal is mandatory and not directory. In that case, the condition precedent was that the assessment appealed against must be paid before the appeal can be heard. Yong J at the High Court said as follows:

> I hold that Section 44(i) is a mandatory provision which goes to the jurisdiction of the Court. It is not directory and cannot be waived.
>
> I further hold that the Court's jurisdiction to entertain appeals from the Board of the Federal Capital of Kuala Lumpur now known as the City of Kuala Lumpur was given by statute - Town Board Enactment Cap 137 - upon certain terms and conditions as prescribed by Section 44(i) and that unless these terms or conditions are complied with the Court's jurisdiction does not arise.

[14] In the instant case, since the defendant did not pay the stipulated fee, the plaintiff was not obliged to refer the objection in question to the OHC. Therefore, the second set of notices of assessment on the 11 sublots on Level 1 was confirmed without a valid objection. At any rate, in the event the defendant was dissatisfied with the failure of the plaintiff to hear his objection, the correct course of action would have been to seek a mandamus to compel the OHC to hear his objection. The defendant did not do so but has sought to raise the issue of unfairness of the assessment as a defence to the plaintiff's suit to recover the debt by way of civil debt. I have already discussed the scheme of the LAO which has provided a special procedure to deal with objections against the quantum of assessment. The only authority that the defendant submitted to argue that he can raise the alleged unfairness of the assessment is the majority judgment in the Federal Court case of *Tenaga Nasional Bhd v. Majlis Daerah Dungun* [2009] 4 CLJ 385. In this case the claim of the local authority was that the rate payer

failed to pay the assessment that was raised. The rate payer did not appeal against the assessment as provided in the Local Government Act 1976. However, when the local authority sued for the arrears of rate, the rate payer raised the defence that the annual value on the holdings was wrongly calculated. This is because in determining gross value, the local authority took into account the machineries that were permanently affixed to the ground. Therefore, the argument of the rate payer was that the assessment was invalid as it was *ultra vires* the definition of "gross value" in the Local Government Act 1976. The local authority had argued that the rate payer did not follow the statutory procedure to object to the assessment. The Federal Court allowed the appeal of the rate payer and dismissed the claim of the local authority. However, this case does support the proposition that a rate payer who does not challenge an assessment through the prescribed statutory process is entitled to do so when sued by the local authority for arrears of rates. The case of *Tenaga Nasional Bhd v. Majlis Daerah Dungun* turned on its own facts and therefore cannot apply to the instant case. In the above case, although the rate payer did not object through the statutory process provided in the Local Government Act 1976, the parties had entered into negotiations to settle the dispute. The rate payer in the instant case was formerly known as Lembaga Letrik Negara and was a public authority. Public authorities are not required to pay rates to local authorities under art. 156 of the Federal Constitution but may make contributions in aid of rates. In the absence of agreement between the parties, a tribunal set up under art. 156 may levy rates. Apparently, the issue whether machineries should be taken into account in determining gross value was pending decision before a Tribunal Board in respect of the Seberang Perai Power station. The High Court found as a fact that the parties had agreed to follow the decision of the Tribunal Board on this issue. The local authority in this case apparently reneged on this agreement. It was because of this agreement that the Federal Court ruled in favour of the rate payer although no objection was taken through the statutory process. However, it is very significant that the Federal Court expressed an opinion that it is not in a position to decide what the proper rate should be. Abdul Aziz FCJ who delivered the majority judgment said as follows:

> ... TNB would at least pay something. *I think that this court is not in a position in the circumstances of this appeal to decide what the rate should be. I agree with the learned trial judge that the determination of the correct rate should be done by the statutory process, because I cannot*

think of any other way in which it could be done. It may be too much to hope that the parties would arrive at an agreed figure - which in my judgment they could legally do - perhaps by continuing with the negotiations from where they left off. (emphasis added)

[15] In the instant case, the defendant had not submitted that the assessment was *ultra vires* the LOA. The assessment was raised following the proper procedure under the LOA. The first objection was heard by the OHC but the defendant, though dissatisfied, did not appeal to the Rating Tribunal Board. When the separate notices were issued to the subdivided shop lots in 2001, the defendant did not pay the prescribed fee of RM20 and therefore the plaintiff did not refer the objection to the OHC. Even if the defendant was justifiably aggrieved about the decision of the plaintiff not to refer the objection to the OHC, he could have sought a mandamus to compel the plaintiff to do so as it is a public authority. However, the refusal of the plaintiff to refer the objection of the defendant to the OHC cannot affect the validity of the rates determined by the plaintiff so long as they followed the procedure in the LOA. Therefore, the defendant has no ground to argue that the assessment was invalid. It is apparent that the real complaint of the defendant is that the rates imposed by the plaintiff were exorbitant. This is the reason the defendant called a qualified valuer to testify on their behalf. However, with respect, the court hearing a recovery action by way of civil debt under s. 83 is not the proper forum to determine what is the proper ARV or proper annual payable rate. At the risk of repetition, I must re-state that the LAO has prescribed a special procedure to appeal against any unfair assessment of the payable rates. An appeal from the OHC would lie to the Rating Appeal Tribunal which comprises a Chairman who is not a member of the local authority and four other members. As stated in the *Tenaga Nasional Bhd v. Majlis Daerah Dungu*n case, the prescribed statutory process is the only route that should be taken to decide what the correct rate is.

[16] In view of my finding that this court has no jurisdiction to consider the defence of the defendant that the assessment was exorbitant and unfair, I need not determine what should have been the fair ARV or annual rate. The plaintiff has proved that the assessment bills in respect of all the 11 sublots of Level 1 was properly issued in accordance with the LOA. In the premises, the defendant is legally liable to pay the same.

Whether The Plaintiff Is Entitled To Impose A Late Payment Fee Of 1% On The Unpaid Assessment Rates Between 1998 And 2005?

[17] The unpaid assessment bills on the 11 lots totalled RM430,029.68. The plaintiff is also claiming a sum of RM223,935.69 as late payment fee. A notice that 1% late payment fee would be imposed was printed on the assessment bills in question. Section 74(1) allows the imposition of late payment fee:

> 74. (1) If any sum payable in respect of any rate remains unpaid after the date upon which payment is due and payable, the owner or owners shall be liable to pay the same together with such fee as the local authority may fix from time to time.

[18] However instead of adding only a one-time 1% default fee on a given assessment bill which is based on a six-month period, the plaintiff had charged 1% on the total remaining unpaid arrears of rate continuously from 1998 to 2005. This means that on the 1998 first half assessment bill which remained unpaid at December of that year, a 2% late fee would have been added. By this method, by the last half of 2005, a 16% late payment fee would have been added. This method is similar to calculating the 1% late payment fee in the manner of calculating accrued penalty interests. The correctness of this method came up for judicial determination in the case of *Generation Products Sdn Bhd v. Majlis Perbandaran Klang* [2008] 5 CLJ 417. The equivalent provision which s. 147(1) of the Local Government Act 1976 reads as follows:

> 147. Proceedings in default.
>
> (1) If any sum payable in respect of any rate remains unpaid at the end of February or August, as the case may be, the owner or owners shall be liable to pay the same together with such fee as the local authority may fix **from time to time**. (emphasis added)

[19] The local authority in the above case argued that the words "from time to time" allowed them to charge fees from time to time on the rates as long as they remain unpaid. The Federal Court ruled that the late payment fee is not a penalty and it can be imposed only once. Counsel for plaintiff conceded to the argument of the counsel for defendant that the Federal Court ruling is

binding on this court. He also agreed with the computation of defence counsel that the late payment fee on all the assessment bills in question would amount to only RM4,300.30 if calculated according to the interpretation of the Federal Court.

[20] In conclusion, I shall grant the judgment in the sum of RM430,029.68 as arrears of rates and RM4,300.30 as late payment fees. I shall also grant post-judgment interests of 8% on the judgment sum until full and final realisation. Counsel for plaintiff suggested that the court should award taxed costs on an indemnity basis because of the wordings of s. 79 which reads as follows:

> 79. All costs of any proceeding under this Part for the recovery of arrears may be recovered as if they formed part of such arrears.

[21] In my opinion, this section only provides that legal costs may be treated as arrears. This would allow a local authority to issue a warrant of attachment to recover the costs as well as the arrears of rates. There is nothing in this provision that allows the granting of costs to be taxed on a full indemnity basis. Costs to be taxed on an indemnity basis is normally granted because a party had conducted its case improperly or in bad faith (see *Takako Sakao v. Ng Pek Yuen & Anor (No 2)* [2010] 1 CLJ 419). As that is not the case here, I shall only grant the usual party to party costs to be taxed unless otherwise agreed.